

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD J. HOLLAND, JR.,)	CASE No.: 2:17-cv-13926-DPH-EAS
)	HON. MARIANNE O. BATTANI
PLAINTIFF,)	
)	
v.)	
)	
UNITED STATES OF AMERICA)	
)	
)	
DEFENDANTS.)	
_____)	

MOTION FOR LEAVE TO FILE
FIRST AMENDED COMPLAINT AND PETITION
FOR MANDAMUS

There was an email between the attorneys on 11/21/2018 entitled to be heard on the motion in which the movant explained the nature of the motion or request and its legal basis and requested but did not obtain concurrence in the relief sought.

NOW COMES, EDWARD HOLLAND, JR. by and through his attorney, NEAL NUSHOLTZ, and moves the Court to amend its Complaint to add NANCY A. BERRYHILL, acting Commissioner of the Social Security Administration, as a defendant and add a claim under 26 U.S.C. §7433 for the following reasons:

1. Plaintiff filed a First Amended Complaint on November 13. (Dkt# 13).
2. On November 21, 2018, counsel for Defendant notified Plaintiff's counsel that FRCP 15 had been amended in 2009 to require leave after 21 days if a motion to dismiss had been filed. Defendant's counsel requested that the First Amended Complaint be withdrawn and a motion to amend be filed.

3. FRCP 15(a)(2) permits a party to amend a complaint with leave if it is done more than 21 days after service or 21 days after a motion under 12(b), (e) or (f).

4. Defendant had filed its motion to dismiss more than 21 days ago.

5. The Complaint was amended because during oral argument on the Defendant's motion to dismiss, counsel for the Defendant represented to the Court that if Plaintiff prevailed in a 26 U.S.C. §7433 claim, that the Defendant would stop seizing 100% of the Plaintiff's social security benefits.

6. To file a claim under §7433, a litigant must exhaust administrative remedies under §7433(d)(1) by mailing an administrative claim for damages under Treas. Reg. 301.7433-1(d)(ii) and either receiving a denial or waiting six months.

7. On April 18, 2018, Plaintiff mailed an administrative claim for damages to:

IRS Collection Advisory Group
Area Director
Internal Revenue Service
985 Michigan Ave. Stop 47
Detroit, MI 48226

8. It has been more than six months under 301.7433-1(d)(ii) and no response to the claim has been received. Plaintiff has exhausted administrative remedies.

9. Plaintiff could not amend his Complaint to include a §7433 claim until after: (1) Defendant's counsel represented to the Court that the government would cease levying upon 100% of Plaintiff's social security; (2) a claim was filed; and (3) six months had elapsed. The Complaint could not be amended sooner.

10. FRCP 15(a)(2) permits that leave to amend shall be freely granted whenever justice so requires.

11. The amended complaint does not unduly impose of Defendant's inasmuch as nothing has happened other than its filing of a motion to dismiss.

12. Justice requires that Plaintiff be granted leave to amend its Complaint.

WHEREFORE Plaintiff prays that this Honorable Court permit the filing of the First Amended Complaint in Dkt# 13.

Dated: November 21, 2018

Respectfully Submitted,

/s/ Neal Nusholtz

Neal Nusholtz P-30223
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Certificate of Service

I hereby certify that on November 21, 2018, I electronically filed the foregoing document with the Clerk of the Court using the ECF system and that I served it via the ECF system on Defendant's counsel.

/s/ Neal Nusholtz

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BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE
FIRST AMENDED COMPLAINT AND
PETITION FOR MANDAMUS

Plaintiff seeks to amend his Complaint to add NANCY A. BERRYHILL, acting Commissioner of the Social Security Administration, as a defendant and to add a claim under 26 U.S.C. §7433 as more clearly indicated in its filed Amended Complaint. (Dkt# 13).

Plaintiff filed a First Amended Complaint on November 13, 2018. (Dkt# 13). On November 21, 2018, counsel for Defendant notified Plaintiff's counsel that FRCP 15 had been amended in 2009 to require leave after 21 days if a motion to dismiss had been filed. Defendant's counsel requested that the Amended Complaint be withdrawn and a motion to amend to be filed. Rule 15 provides as follows:

Rule 15 – Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

The Supreme Court has indicated that the phrase in FRCP 15(a)(2) "The court should freely give leave when justice so requires" means that leave to amend should be freely given unless there is a good reason not to:

In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' *Foman v. Davis*, 371 U.S. 178, 182, (1962).

The Defendant is not impaired by an amended complaint. There has been no discovery and not even an answer to the original Complaint has been filed. Moreover, Plaintiff could not amend his Complaint to include the §7433 claim until after: (1) government counsel represented to the court that a §7433 claim, if successful, would stop the seizure of 100% of the Plaintiff's social security, (2) an administrative claim was filed; and (3) six months elapsed.

Plaintiff requests that this Honorable Court permit Plaintiff to file its First Amended Complaint.

Dated: November 21, 2018

Respectfully Submitted,

/s/ Neal Nusholtz

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/s/ Neal Nusholtz

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